

State Office of Administrative Hearings

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY



Shelia Bailey Taylor
Chief Administrative Law Judge

2007 APR 10 AM 11:28

CHIEF CLERKS OFFICE

April 9, 2007

Derek Seal
General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-07-0268; TCEQ Docket No. 2004-0085-PST-E; In Re:
Executive Director of the Texas Commission on Environmental Quality v. Millenium
Gasoline Corporation D/B/A Amos Shell

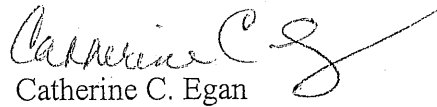
Dear Mr. Seal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than April 30, 2007. Any replies to exceptions or briefs must be filed in the same manner no later than May 10, 2007.

This matter has been designated **TCEQ Docket No. 2004-0085-PST-E; SOAH Docket No. 582-07-0268**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Catherine C. Egan
Administrative Law Judge

CCE:nl
Enclosures
cc: Mailing List

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: MILLENIUM GASOLINE CORP / AMOS SHELL

SOAH DOCKET NUMBER: 582-07-0268

REFERRING AGENCY CASE: 2004-0085-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE

ALJ PAUL D. KEEPER

REPRESENTATIVE / ADDRESS

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MJR ENVIROMENTAL, INC.

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-07-0268
TCEQ DOCKET NO. 2004-0085-PST-E

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2007 APR 10 AM 11:28

EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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BEFORE THE STATE OFFICE

CHIEF CLERKS OFFICE

v.

OF

MILLENIUM GASOLINE
CORPORATION D/B/A
AMOS SHELL

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. Introduction

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess an administrative penalty of \$11,100 against Millenium Gasoline Corporation d/b/a Amos Shell (Respondent) for alleged violations of 30 TEX. ADMIN. CODE (TAC) §§ 115.246(7)(A), 334.7(d)(3), 334.10(b), and 334.50(b)(1); TEX. WATER CODE ANN. § 26.3475(c)(1); and TEX. HEALTH & SAFETY CODE ANN. § 382.085(b), and recommends that Respondent be ordered to bring its facility into compliance with statutes and rules referenced above. According to the ED, Respondent's failure to properly monitor, maintain, and keep reports for underground storage tanks (USTs), exposed the public to the possible exposure of unsafe levels of pollutants.

After being properly notified of the hearing, Respondent failed to appear at the hearing. Therefore, the Administrative Law Judge (ALJ) recommends that the Commission deem as true the facts alleged by the ED in its second amended report and petition, enter a default order against Respondent, impose the ED's recommended sanctions, and revoke Respondent's UST delivery certificates pursuant to 30 TAC § 334.8(c)(6).

II. Jurisdiction and Violations

Respondent owns and operates a convenience store with retail sales of gasoline. The convenience store is located at a 3114 West University Drive, Denton, Denton County, Texas (the

Station). The Station has four USTs that TCEQ regulates. During an inspection on May 29, 2003, TCEQ staff documented that Respondent:

- failed to monitor USTs for releases as required by 30 TAC §§ 334.50(b)(1)(A) and 334.10(b) and TEX. WATER CODE ANN. § 26.3475(c) by failing to keep records for testing on the automatic tank gauging and inventory control release detection system used on the Station's USTs.
- failed to maintain Stage II records on site and make them immediately available for review as required by 30 TAC § 115.246(7)(A) and TEX. HEALTH & SAFETY CODE ANN. § 382.085.
- failed to amend, update, or change registration information as required by 30 TAC § 334.7(d)(3) as evidenced by the Petroleum Storage Tank (PST) Registration Database reflecting an incorrect product stored in one tank and the incorrect size of the tank.

Under TEX. WATER CODE ANN. § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Texas Water Code within the Commission's jurisdiction or a rule adopted or an order or permit issued thereunder. As pertinent to this case, the penalty may not exceed \$10,000 per day of violation.¹

Based on the Staff's documented findings, Respondent violated the Texas Water Code, the Texas Health and Safety Code, and the Commission's rules. Each violation is a basis for the imposition of administrative penalties under TEX. WATER CODE ANN. § 7.051. The ED calculated the number of violation events to be three. Thus, the Commission has jurisdiction over Respondent, has the authority to assess the penalties, to order that Respondent come into compliance with the above reference statutes and Commission's rules, or if Respondent fails to participate in the hearing


¹ TEX. WATER CODE ANN. § 7.052(c).

to revoke Respondent's UST certificate as requested by the ED. Further, the State Office of Administrative Hearings (SOAH) has jurisdiction over this matter as reflected in the Conclusions of Law that are in the attached Default Order.

III. Default

A default in this case is entered pursuant to 1 TAC § 155.55. That rule specifies that a default shall be issued only upon adequate proof that proper notice was provided to the defaulting party. As set forth in the Findings of Fact and Conclusions of Law contained in the attached Default Order, the ALJ finds that the requisite notice was provided to Respondent, in accordance with TEX. GOV'T CODE ANN. § 2001.052, 1 TAC §§ 155.27 and 155.55, and 30 TAC §§ 1.11, 39.25, and 334.8(c)(6). Therefore, the ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Default Order assessing an administrative penalty of \$11,100 against Respondent for the violations in issue and that Respondent's UST delivery certificate be revoked pursuant to 30 TAC § 334.8(c)(6).

SIGNED April 9, 2007.



CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER Assessing an Administrative Penalty Against
Millenium Gasoline Corporation d/b/a Amos
Shell; TCEQ Docket No. 2004-0085-PST-E;
SOAH Docket No. 582-07-0268

On _____, 2007, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Second Amended Report and Petition (EDSARP) recommending that the Commission enter an order assessing an administrative penalty against Millenium Gasoline Corporation d/b/a Amos Shell (Respondent) and directing Respondent to take corrective action. A Proposal for Decision (PFD) was presented by Administrative Law Judge (ALJ) Catherine C. Egan with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDSARP on February 8, 2007, in Austin, Texas.

The Executive Director (ED), represented by Laurencia Fasoyiro, appeared at the hearing. Respondent was not present at the hearing nor represented by counsel and did not file for a continuance. The ED requested that a default be entered against Respondent. The ALJ agreed with the ED's request.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Respondent owns and operates a convenience store with retail sales of gasoline located at 3114 West University Drive, Denton, Denton County, Texas.
2. On May 29, 2003, TCEQ staff conducted an inspection of Respondent's facility to determine if Respondent was complying with statutes within the Commission's jurisdiction and with the Commission's rules.
3. On February 4, 2005, the ED filed the EDSARP in accordance with TEX. WATER CODE § 7.054, alleging that Respondent had three violations of 30 TEX. ADMIN. CODE (TAC) §§ 115.246(7)(A), 334.7(d)(3), 334.10(b), 334.50(b)(1); TEX. WATER CODE § 26.3475(c)(1); and TEX. HEALTH & SAFETY CODE ANN. § 382.085(b).
4. In the EDSARP, the ED alleges that Respondent engaged in activity that resulted in the possible exposure of human health and environment to pollutants which would exceed levels that are protective of receptors.
5. For the three violations alleged in the previous finding, the ED seeks a penalty of \$11,100 because one was a major environmental violation, one was a major programmatic violation, and one was a minor programmatic violation.
6. Further, the ED recommends that Respondent take the corrective action necessary to bring its station into compliance with the Texas Water Code, the Texas Health and Safety Code, and TCEQ rules.
7. It is the Commission's policy under 30 TAC § 334.8(c)(6) to revoke the underground storage tank (UST) delivery certificates when a party fails to participate in a hearing and defaults.

8. The ED mailed a copy of the EDSARP to Respondent's last address known and to the Commission on the date that the EDSARP was filed.
9. On June 22, 2006, Respondent filed a response to the EDSARP, and the matter was subsequently referred to SOAH for hearing.
10. On October 2, 2006, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Respondent.
11. The notice of hearing:
 - (a) Indicated the time, date, place, and nature of the hearing;
 - (b) Stated the legal authority and jurisdiction for the hearing;
 - (c) Indicated the statutes and rules the ED alleged Respondent violated;
 - (d) Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the ED;
 - (e) Advised Respondent, in at least 12-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - (f) Included a copy of the ED's penalty calculation worksheet, which shows how the penalty was calculated for the alleged violations.
12. On October 13, 2006, the parties filed a Joint Motion to Waive Appearance at the Preliminary Hearing and Submission of Agreed Hearing Schedule. The Motion established February 8, 2007, as the date for the hearing on the merits.
13. On October 19, 2006, an Order setting the hearing for February 8, 2007, the agreed upon date, was sent to Respondent. Respondent had proper notice of the hearing.

14. On February 8, 2007, ALJ Catherine C. Egan convened the hearing on the merits. The Respondent did not appear, either personally or through a representative.
15. Based on Respondent's failure to appear at the hearing, the ED moved for a default against Respondent in which all of the ED's allegations would be deemed admitted as true and the penalties the ED seeks would be assessed against Respondent. The ALJ granted the motion for default.

II. CONCLUSIONS OF LAW

1. Respondent's business is subject to the regulation of the Commission. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations alleged in this proceeding.
3. As required by TEX. WATER CODE ANN. § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDSARP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
4. As required by TEX. GOV'T CODE ANN. § 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TAC § 155.27; and TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties. Additionally, Respondent was

notified, in accordance with 1 TAC § 155.55, that if Respondent failed to appear at the hearing, a default could be rendered against Respondent in which all the allegations contained in the notice of hearing would be deemed admitted as true.

5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
6. Based on the above Findings of Fact and Conclusions of Law:
 - (a) A default should be entered against Respondent in accordance with 1 TAC § 155.55 and 30 TAC § 70.106; and
 - (b) The allegations contained in the notice of the hearing, including those in the EDSARP attached thereto, are admitted as true.
7. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TAC §§ 115.246(7)(A), 334.7(d)(3), 334.10(b), 334.50(b)(1); TEX. WATER CODE § 26.3475(c)(1); and TEX. HEALTH & SAFETY CODE ANN. § 382.085(b).
8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
 - (a) Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - (b) The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - (c) The history and extent of previous violations by the violator;
 - (d) The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - (e) The amount necessary to deter future violations; and
 - (f) Any other matters that justice may require.

9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director properly calculated the penalties for the alleged violation, and a total administrative penalty of \$11,100 is justified and should be assessed against Respondent.
11. If a person violates any statute or rule within the Commission's jurisdiction, the commission may order the person to take corrective action.
12. The Commission may revoke Respondent's UST delivery certificate pursuant to 30 TAC § 334.8(c)(6) for Respondent's failure to appear and participate at the hearing resulting in this default.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Commission Order, Millenium Gasoline Corporation d/b/a Amos Shell (Respondent) shall pay an administrative penalty in the amount of \$11,100 for violation of 30 TAC §§ 115.246(7)(A), 334.7(d)(3), 334.10(b), and 334.50(b)(1)(A); TEX. WATER CODE ANN. § 26.3475(c)(1); and TEX. HEALTH & SAFETY CODE ANN. § 382.085(b). Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re:

Millenium Gasoline Corporation d/b/a Amos Shell; TCEQ Docket No. 2004-0085-PST-E;
Enforcement ID No. 32130" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
3. Upon the effective date of the Commission's order, Respondent's UST delivery certificate is revoked and Respondent will no longer be permitted to accept delivery of petroleum or any regulated substance into its underground storage tanks, as provided by 30 TAC § 334.8(c)(6).
4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are denied.
5. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
6. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.

7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman
For the Commission